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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Interest of The Magazine Publishers Association, Inc.	1
Preliminary Statement	2
Summary of Argument	3
Point I—The meaning and effect of this case reach far beyond the particular rights and duties of the specific parties	4
Point II—The unauthorized copying of copyrighted periodicals constitutes infringement	5
Point III—The Court below erred in concluding that petitioner's entire copyrighted works could be machine copied with impunity under respondent's fair use defense	6
Point IV—The Court below erred by overstressing the need of proof of serious economic detriment to the petitioner-copyrightee in measuring "fair use"	8
Conclusion	8

TABLE OF AUTHORITIES

PAGE

Cases:

Hill v. Whalen & Martell, Inc., 220 Fed. 359 8

The Williams & Wilkins Company v. United States, 487 F. 2d 1345 ..... 2, 3, 4, 5, 6

Statutes:

17 U.S.C. 1 ..... 5, 6

17 U.S.C. 3 ..... 5, 7

Other Authorities:

Frankfurter, Some Reflections on the Reading of Statutes 5

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Interest of The Magazine Publishers Association, Inc.

The Magazine Publishers Association is a national trade association founded in 1919 as a New York membership corporation. Its present membership is composed of more than 125 periodical publishers whose more than 450 publications appear in varying degrees of periodicity, such as on a monthly, bi-monthly, weekly or bi-weekly basis. Such

publications are, in virtually all instances, statutorily copyrighted, and are distributed in the main nationally throughout the United States. In the aggregate the publications of this Association's members have a circulation of approximately 200,000,000 copies per issue. It has been estimated that the combined readership of these publications exceeds 89% of the literate adults in the United States.

The Magazine Publishers Association has, among its active and important committees, its Legal Affairs Committee, which was formerly for many years known as The Copyright Committee, whose area of concern and interest includes copyright matters of particular importance to publishers of magazines and other periodical publications; this Committee advises the Association on such matters. The Association has joined in amici briefs in this Court.

The Association files this amicus brief (with the written consent of both petitioner and respondent herein) because the decision below in the Court of Claims raises issues of singular significance to copyright proprietors of periodicals, including magazines.

Preliminary Statement

The case below, reported in 487 F.2d 1345, was decided by a closely divided court. The petitioner, as the successful plaintiff at the trial level claimed that its statutory copyrights to certain of its medical journals had been infringed by the respondent's unauthorized machine copying of entire articles contained within those journals, for which alleged misconduct petitioner sought reasonable compensation from the Government under the applicable jurisdictional statute. As indicated above, albeit petitioner's position had been vindicated by the finding of copyright infringement by the Trial Judge, such imposition of liability was thereafter reversed by the Court of Claims itself.

The holding of the Court of Claims appears on page 1453 of the majority opinion, and is to the effect that the extensive photocopying of entire, discrete articles included in petitioner's copyrighted medical periodicals by respondent's National Institutes of Health and National Library of Medicine and the not-for-profit dissemination of such photoduplicates by those governmental agencies to and among presumed scientific researchers and libraries constituted only "fair use", i.e. non-infringing use, of petitioner's copyrighted, composite works.

Summary of Argument

1. The Court's decision below, especially its rationale,

   (a) has an importance transcending the interests of the particular litigants,

   (b) misreads the law on what constitutes a copyright infringement by "copying" insofar as periodicals are concerned, and

   (c) misreads the law on what constitutes "fair use" as a copyright infringement defense.

2. The error of the holding and especially of the ratio decidendi of the Court of Claims herein should be corrected and the confusion and uncertainty engendered thereby should be removed by this Court's hearing of this case on the merits.

POINT I

The meaning and effect of this case reach far beyond the particular rights and duties of the specific parties.

While we believe that the holding below is erroneous, even when it is strictly confined to the factual context of the instant case (and the opinion of Davis, J. speaking for the Court below seems at pains to state that such holding should be so confined), what, we submit, is more importantly troublesome is the unsound and confusion-begetting rationale of such holding.

The far-reaching importance of the basic issue of this case even on its particular facts is found in the dissent below where Chief Judge Cowen stated at page 1364:

> "* * * What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by libraries on a scale so vast that it dwarfs the output of many small publishing companies."

That the mistaken and unprecedented decision of the Court of Claims herein will have an adverse impact extending far beyond the particular facts of this case and the parties hereto is presciently indicated by Nichols, J. in his dissent where he said at page 1387:

> "* * * However, hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect."

The majority below, also, recognized the overriding significance of the instant case. This it did both overtly and covertly, so to speak. At the outset of its opinion, the

majority stated that it was confronting "a ground-breaking infringement action" (1346). Furthermore, it characterized its decision as a "holding operation" pending remedial legislation (1363). The concealed recognition of this case's importance is evidenced by the Court's critical disregard of controlling precedent to such an extent that its decision may rightly be termed—as the dissent so termed it—an example of "judicial legislation" (1371).

POINT II

The unauthorized copying of copyrighted periodicals constitutes infringement.

The Court below entertained what it called "solid doubt" that periodicals as such come under the panoply of copyright protection insofar as copying per se is concerned. While this may very well have been a "solid doubt" for the Court below it is, we submit, a gratuitous doubt. The plain and unmistakable wording of the Copyright Code (17 U.S.C.) quite clearly provides in Section 1 thereof that all copyrighted works, and of course periodicals and composites are among such works (17 U.S.C. Section 3), are entitled to exclusivity not only as to the printing, reprinting and publishing of such works but also as to the copying thereof. As the dissent herein rightly observed there seems to be no legitimate reason for harking back to inapplicable legislative history regarding prior copyright acts. At bar, the meaning of the words used in said Section 1 should be derived from "* * * the words themselves * * *" and "* * * their setting in a text * * *" (Frankfurter, Some Reflections on the Reading of Statutes 15.—1947) so that here a court may quite properly "hug the shores of the statute itself" in construing said Section 1.

That the aforementioned "solid doubt" can have a seriously adverse effect on all periodicals, quite apart from those particular ones involved at bar, seems manifest because, if such doubt is to hover over this genre the copyrighted material, then publishers of copyrighted periodicals will never know with the certainty what the law provides, that is, whether the mere copying of their works will entitle them to the same measure of protection as the law accords to other copyrighted works. In short, we submit, there seems to be no basis in reason or judicial authority for the exclusion of copyrighted periodicals from the reach of Section 1 of the Copyright Code to the degree that they may be unauthorizedly copied without redress.

POINT III

The Court below erred in concluding that petitioner's entire copyrighted works could be machine copied with impunity under respondent's fair use defense.

In the Court's opinion there appears at page 1353 a singularly strange statement, couched in the form of a suggestion, to the effect that the copying of "an entire copyrighted work, any such work, cannot ever be 'fair use'." When such suggestion is read, certainly in the factual matrix of this case, one's olfactory sense gets the scent of straw. The Court dismissed the suggestion as "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice" (1353). We submit that such dismissal is simplistic and at variance with the authorities that have considered the matter. Yet the Court's dismissal of wholesale copying, i.e., the complete

copying of a copyrighted work, under the guise of "fair use," really approaches the crux of this case. Of course, at bar we have the copying of several articles in their respective entireties. But then each of petitioner's journals, whence the articles came, were copyrighted and under Section 3 of Copyright Code the copyright to the whole work carries with it the copyright to each copyrightable, component or constituent part thereof. This is no more than an example of the greater including the less. The general copyright to an entire composite is spread so as to cover the disparate articles within it. (See A. H. Wasserstrom, The Copyrighting of Contributions to Composite Works, 31 Notre Dame Lawyer 381, 403 et seq.—1956). In short, each of the separate articles comprising the petitioner's medical journals constituted a distinct copyrighted work, even without a specific notice of copyright imprinted thereon. When such articles were unauthorizedly photocopied petitioner's copyrights thereto were, we submit, infringed, and the bounds of "fair use" were overpassed. This conclusion, we urge, follows from the very nature of the "fair use" doctrine, one of whose essential elements is the "materiality" or "substantiality" of the borrowed or used "part" or "portion" of the copyrighted work. Such qualitative evaluation, under the rubric of "materiality" or "substantiality," would not perforce be necessary, we submit, were an entire work so borrowed or used, as occurred at bar. We think it clearly follows, both in reason and authority that, when the whole of each article in question was photocopied, the copyright to the medical periodical encompassing it was infringed.

POINT IV

The Court below erred by overstressing the need of proof of serious economic detriment to the petitioner-copyrightee in measuring "fair use."

The fair use doctrine is made up of a plurality of considerations or criteria, only one of which is the adverse economic impact of the use on the potential market for the copyrighted work. Put another way, the copyrightee need not show actual damage, but rather only that the demand for his work will be materially diminished by the use of the accused copy (*Hill* v. *Whalen & Martell,* 220 Fed. 359).

Conclusion

The petition for the writ of certiorari herein should be granted so as to correct the substantial errors below and to obviate the confusion and uncertainty affecting important phases of copyright law arising from such errors.

Respectfully submitted,

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